



**Muigai v Republic (Miscellaneous Criminal Application 14 of 2023)
[2023] KEHC 25079 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
MISCELLANEOUS CRIMINAL APPLICATION 14 OF 2023
DR KAVEDZA, J
NOVEMBER 10, 2023**

BETWEEN

MICHAEL GITAU MUIGAI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant filed the notice of motion dated February 15, 2023 and prayed for orders, *inter alia*: a transfer of the case to another court of similar jurisdiction; an order to recall three prosecution witnesses after issuance of documents relied upon by the prosecution and stay of proceedings before the trial court.
2. The applicant avers that he was not issued with the necessary documents during the proceedings. He further stated that he has a hearing problem hence has not been able to follow the proceedings virtually.

Analysis and determination.

3. I have considered the application. The issue for determination is whether the applicant should be granted the revisionary orders sought.
4. The power of this court in its revisionary jurisdiction is founded under section 362 of the [Criminal Procedure Code](#) (cap 75) Laws of Kenya which provides that:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy itself as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.



5. Article 165(6) of the Constitution provides that:

The high court has supervisory jurisdiction over the subordinate courts and over any person, body, or authority exercising a judicial or quasi-judicial function, but not over a superior court.

6. Consequently, this court has jurisdiction to entertain the application before me. On the merits of the application, I will begin by giving a little background of this case. The applicant is charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. Five witnesses have since testified in support of the prosecution's case. The applicant has made an application to recall three witnesses.

7. The applicant also prayed for the transfer of the case to another court of similar jurisdiction. No evidence was availed to support of this prayer that justice would not be served if the same court heard the matter. The prayer is found to be lacking in merit.

8. The applicant has filed an application seeking to recall three prosecution witnesses for cross-examination namely; Karen Wanjiku, Salome Wanjiku and Brian Oluoch.

9. On this prayer, article 50 (2) (j) and (k) of the Constitution of Kenya, 2010 provides that;

(2) Every accused person has the right to a fair trial, which includes the right: —

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence.

10. In the case of; Thomas Alugha Ndegwa v Republic [2016] eKLR, the Court of Appeal observed that;

“The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the Public Prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words, be able to, argue their cases on an equal footing.”

11. Similarly, section 150 of the Criminal Procedure Code (cap 75) Laws of Kenya, states that:

“A court may, at any stage of a trial or other proceeding under this code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.



12. In the same vein, section 146(4) of the *Evidence Act*, (cap 80) Laws of Kenya states: -

“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively”.

13. It is therefore clear from the above provisions of the law that, it is in the interest of justice and fair trial that where a witness has to be recalled, unless for good reasons the same cannot be tenable or achievable. I did not find any such reasons on record. Additionally, if the witnesses are easily available the application for recall should be allowed. The witnesses in issue, testified in 2022. I allow the prayer as a lot of time has not lapsed since they gave their evidence. in addition, the prosecution would not be prejudiced if the orders sought are granted.

14. I consequently allow the prayer to recall the prosecution witnesses namely; Karen Wanjiku, Salome Wanjiku and Brian Oluoch. However, the witnesses will only be recalled for cross-examination on the documents subsequently availed. There should be no cross-examination on issues already dealt with.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 10TH DAY OF NOVEMBER 2023.

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D. KAVEDZA

JUDGE

In the presence of:

Ms Akunja for the State.

Applicant absent (VTC)

Joy C/A.

